STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED February 18, 2014
v	No. 312280 Calhoun Circuit Court
MATTHEW ALLEN MILBOURN, Defendant-Appellant.	LC No. 2011-003419-FC

Before: BOONSTRA, P.J., and CAVANAGH and FITZGERALD, JJ.

PER CURIAM.

Defendant appeals as of right jury convictions of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (person under 13 years of age), and second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a). Defendant was sentenced as a second habitual offender to 225 to 450 months for CSC I and 107 to 270 months for CSC II. We affirm.

The charges against defendant arose from sexual acts he perpetrated against his former stepdaughter while he was still married to the victim's mother. The victim, who was born on March 30, 1995, testified that the incidents began when she was three years old and occurred daily. The victim's mother and defendant divorced when the victim was eleven years old. When the victim was nine years old, she told her mother that defendant was touching her inappropriately, but the police were not contacted at that time. Subsequently, in October 2011, defendant was charged with two counts of CSC I and one count of CSC II for sexual acts committed against the victim between 1998 and 2006. The felony warrant and complaint stated that CSC I was subject to a mandatory minimum sentence of 25 years' incarceration. Prior to trial, defendant was offered a plea agreement that would have allowed for the dismissal of one CSC I charge, the CSC II charge, and the second-habitual sentence enhancement if defendant pleaded guilty to CSC I. After the plea offer was rejected, this matter proceeded to a jury trial on March 13, 2012, and defendant was found guilty of one count of CSC I and CSC II. On April 9, 2012, defendant was sentenced as set forth above.

On September 10, 2012, defendant filed a claim of appeal. Subsequently he timely moved this Court to remand this matter for an evidentiary hearing, alleging ineffective assistance of counsel. Defendant argued that his attorney incorrectly advised him that if he pleaded guilty to CSC I, he was facing a mandatory minimum sentence of 25 years. However, MCL 750.520b(2)(b) was amended to include this mandatory minimum sentence in 2006, after the

alleged crimes occurred; thus, defendant was not subject to a mandatory minimum sentence of 25 years. Defendant argued that, if he had been properly advised by his attorney that he was not subject to the mandatory minimum sentence, he would have accepted the plea agreement instead of proceeding with a jury trial. Thus, defendant argued, he was denied the effective assistance of counsel and was entitled to a new trial. This Court granted defendant's motion to remand "so that [defendant] may move for a new trial based on ineffective assistance of counsel" and retained jurisdiction. *People v Milbourn*, unpublished order of the Court of Appeals, entered May 2, 2013 (Docket No. 312280).

On June 25, 2013, an evidentiary hearing was conducted in the trial court. Defendant's attorney, Virginia Cairns, testified that the proposed plea agreement included that, if defendant pleaded guilty to one count of CSC I, the two other charges and the habitual offender would be dismissed. But there was no sentence agreement at that point. Cairns testified that the complaint included the mandatory minimum 25-year sentence; however, after reading the police report she knew that the alleged events giving rise to the charges against defendant occurred, if at all, before the effective date of this amendment to the statute. Cairns testified that she attempted to have the complaint amended in that regard and placed three telephone calls in that effort. The issue was not addressed by the prosecution until after the trial, when an amended information was filed that did not include reference to the mandatory minimum sentence.

Cairns testified that she discussed the plea offer with defendant and told him that the 25-year mandatory minimum sentence did not apply to him. She testified that she sent several letters to defendant, including one dated January 5, 2012, and another dated March 14, 2012. Those letters were admitted into evidence. In one letter, Cairns advised defendant that "an estimate of the guidelines would be 43 months to 86 months as a minimum." Defendant responded by requesting that Cairns write the prosecutor and make a counter-offer; he would plead guilty on the CSC II charge, with a sentence cap of around 10 years, for a dismissal of the two CSC I charges and the habitual. On January 18, 2012, Cairns advised the prosecutor of the counter-offer but never received a response. At the pretrial hearing, Cairns asked the prosecutor about the counter-offer and the prosecutor said that the family was not agreeable to the counter-offer.

On cross-examination by the prosecution, Cairns identified an affidavit that she prepared and signed which set forth her "position on the conversations [she] had with [defendant] regarding the 25-year mandatory minimum sentence." The affidavit was admitted into evidence. Thereafter, the trial court asked Cairns when she first orally told defendant that there was not a mandatory minimum 25-year sentence and Cairns responded that she told defendant at the preliminary examination after she had reviewed the police report and "realized that the penalty portion of the complaint was in error." When asked if there was more than one occasion when she discussed it with him orally, Cairns responded, "Oh sure." Cairns' letter to defendant dated January 5, 2012, also stated: "as we discussed before there's no 25-year minimum."

Defendant also testified at the evidentiary hearing. Defendant recalled that the plea offer was "to plead guilty to one count of first degree with a mandatory minimum of 25 years and the other first and the second and the habitual would be dropped." Defendant testified that Cairns told him that there was a mandatory minimum sentence of 25 years. He also testified that he did not receive Cairns' letter addressed to him and dated January 5, 2012, and would have

"remembered explaining to me that there was no mandatory minimum and that's the whole problem I had with not taking the plea." Defendant testified that he also did not receive Cairns' letter dated March 14, 2012, which advised that there was no mandatory minimum sentence. He further testified that, if he had been advised that there was no mandatory minimum sentence, he would have taken the plea offered. Defendant recalled that, before the February 17, 2012 pretrial conference, he asked Cairns about when the law changed regarding the 25-year minimum because he had heard about the change in the law on the radio and she said, "oh, that was a long time ago" and then "[went] on to talk about something else." On cross-examination, defendant testified that Cairns told him the 25-year mandatory minimum applied to him at the preliminary examination and at the pretrial conference.

Following the testimony, the trial court denied defendant's motion for a new trial. The trial court noted that the amended information, which deleted the 25-year mandatory minimum sentence, was dated April 10, 2012, after the trial and sentencing had occurred. However, the trial court concluded that defendant had not met his burden of proof because he had "not proven that he was told in connection with the plea offer that sentencing for first degree criminal sexual conduct in this case would include and mandate a 25-year minimum mandatory sentence based on the age of the complaining witness." The trial court noted that, although defendant claimed that he did not receive Cairns' letters, "there's nothing to suggest that they weren't prepared by her or weren't sent." Cairns' letter dated January 5, 2012, stated: "[A]s we discussed before there is no 25-year minimum in your case. This is because the charges against you predate that 25-year minimum law. In other words, the crimes you are charged with committing occurred before that law existed." After considering Cairns' letters, her affidavit, and her testimony, the trial court held that it was satisfied "that the Defendant was on notice before trial and in connection with the plea offer that a plead [sic] to criminal sexual conduct first degree in this case would not require the imposition of a 25-year minimum sentence." Thus, the trial court rejected defendant's claim that he was told by Cairns that the mandatory 25-year minimum applied to him. Accordingly, defendant's motion for a new trial was denied.

On appeal, defendant argues that he was denied the effective assistance of counsel because his trial attorney, Cairns, erroneously informed him that the plea agreement offered to him required a 25-year minimum sentence which caused him to reject the plea agreement. We disagree.

A criminal defendant's constitutional right to the effective assistance of counsel includes the right to effective assistance during plea negotiations. *Lafler v Cooper*, 566 US __; 132 S Ct 1376, 1384; 182 L Ed 2d 398 (2012); *People v Douglas*, 296 Mich App 186, 205; 817 NW2d 640 (2012), lv gtd 493 Mich 876 (2012). Counsel must "properly inform the defendant of the consequences of accepting or rejecting a plea offer." *Id*. To establish ineffective assistance of counsel, the defendant must first show that his counsel's performance fell below an objective standard of reasonableness. *Id*. The defendant must then establish that there is a reasonable probability that, absent counsel's error, the outcome of the plea process would have been different. *Id*. at 205-206; see also *Hill v Lockhart*, 474 US 52, 58-59; 106 S Ct 366; 88 L Ed 2d 203 (1985), citing *Strickland v Washington*, 466 US 668; 104 S Ct 2052; 80 L Ed 2d 674 (1984). However, counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id*. at 690; see also *People v Vaughn*, 491 Mich 642, 670; 821 NW2d 288 (2012). The issue whether a defendant

was denied the effective assistance of counsel presents a mixed question of fact and constitutional law. *Id*. at 650. The trial court's findings of fact are reviewed for clear error, but questions of law are reviewed de novo. *Id*.

Here, defendant claims that he was unable to make an informed decision regarding the plea offer because Cairns advised him that, if he pleaded guilty to CSC I, he was subject to a mandatory minimum 25-year sentence. However, Cairns testified at the evidentiary hearing that she knew after reading the police report that the mandatory minimum 25-year sentence did not apply to defendant. She also testified that she repeatedly advised defendant, both verbally and in writing, that the mandatory minimum sentence provision did not apply to him. Two letters were admitted into evidence which supported Cairns' testimony. In a letter addressed to defendant and dated January 5, 2012, Cairns wrote:

> As we discussed before, there is no 25-year minimum in your case. This is because the charges against you predate that 25-year minimum law. In other words, the crimes you are charged with committing occurred before that law existed.
>
> Therefore, you will be dealing with basic guidelines in effect at the time of the offenses. Based on the waiver offer (1 count CSC 1, dismiss everything else, no sentence agreement), an estimate of your guidelines would be 43 months to 86 months as a minimum. Again, this is only an estimate.

Similarly, in a letter dated March 14, 2012, Cairns wrote: "I have also provided my estimate of your sentencing guidelines. Moreover, I have informed you the mandatory 25-year minimum does not exist in your case."

Although defendant denied receiving either of these letters, they support the facts that Cairns knew that the 25-year mandatory minimum sentence did not apply to defendant and that she had discussed this issue with defendant on more than one occasion. In light of the evidence, we will not presume that Cairns failed to advise defendant—consistent with her knowledge—that the 25-year mandatory minimum sentence did not apply to defendant. Defendant's mere denial of such information is insufficient to overcome the evidence. And we reject defendant's conclusory and unsupported claim made in his supplemental brief that, even if Cairns told him that there was no mandatory minimum sentence, it was possible that "he did not comprehend what she was talking about" . . . "because she did not spend enough time with him to explain the consequences of the plea offer versus going to trial." Again, counsel is "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Strickland*, 466 US at 690; see also *Vaughn*, 491 Mich at 670. Accordingly, the trial court properly denied defendant's motion for a new trial premised on this claim of ineffective assistance of counsel.

Next, defendant argues that he was denied a fair trial because of the improper admission of a prior consistent statement allegedly made by the victim. After review of this unpreserved claim for plain error affecting defendant's substantial rights, we disagree. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

Defendant argues that Michigan State Police Officer Nicole Hiserote was improperly permitted to testify that the statement the victim gave to her during the investigation of this matter was consistent with her trial testimony. Specifically, Officer Hiserote was asked: "Did [the victim] ultimately give you a statement?" Officer Hiserote replied in the affirmative. She was then asked: "Was it consistent with her testimony today?" Officer Hiserote again replied in the affirmative. Defendant argues that this testimony violated MRE 801(d)(1)(B) because it was a prior consistent statement and there was not a claim of recent fabrication. However, Officer Hiserote did not testify about any specific "statement" made by the victim to her during the interview. See MRE 801(a). Hearsay "is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). Thus, MRE 801(d)(1)(B), which defines statements that are not hearsay, was not implicated by Officer Hiserote's testimony. Accordingly, defendant has failed to establish plain error affecting his substantial rights. See *Carines*, 460 Mich at 774.

In his Standard 4 brief, defendant argues that his counsel was ineffective because she "was not competent in investigating facts in alleged crimes." After review of this unpreserved claim for plain error apparent on the record and affecting defendant's rights, we disagree. See *Carines*, 460 Mich at 774; *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

Defendant's arguments are premised on his claim that Cairns told him that the 25-year mandatory minimum sentence applied. Defendant argues that if she would have investigated the facts in this case, she would have determined that it did not apply. However, as discussed above, we reject defendant's arguments that Cairns was unaware that the mandatory minimum sentence did not apply and that she failed to advise defendant of that fact. Accordingly, defendant's arguments in this regard are likewise without merit.

Defendant also argues in his Standard 4 brief that he was denied the effective assistance of counsel because "time was not allotted for preparation and consideration of case with defendant." That is, Cairns did not spend enough time discussing the plea offer with him. Defendant also argues that "there was lack of privacy for attorney/client consultation" because Cairns met with him during the pretrial conference in the presence of court officers and he was reluctant to "discuss pertinent issues concerning the case." Defendant further argues that Cairns violated his "confidence and trust" because, although she told defendant she would see him before the trial, she did not return. However, evidence of these claimed deficiencies are not apparent from the record and, thus, are not subject to our review. See *People v Horn*, 279 Mich App 31, 38; 755 NW2d 212 (2008). "If the record does not contain sufficient detail to support defendant's ineffective assistance claim, then he has effectively waived the issue." *Davis*, 250 Mich App at 368. Accordingly, the arguments set forth in defendant's Standard 4 brief in support of his ineffective assistance of counsel claims do not establish a basis for relief.

Affirmed.

/s/ Mark T. Boonstra
/s/ Mark J. Cavanagh
/s/ E. Thomas Fitzgerald